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IN THE

Supreme Court of the United States of America

DERRELL PHILYAW.....APPELLANT

VS. NO. 821

STATE OF ARKANSAS.....APPELLEE

JURISDICTIONAL STATEMENT.

APPEAL FROM THE SUPREME COURT OF ARKANSAS
TO THE SUPREME COURT OF THE UNITED STATES.

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I.

The opinions delivered in the Supreme Court of Arkansas, both the majority opinion and the minority dissenting opinion, are reported in 305 SW (2d) 851, ... Ark. ..... Such opinions are attached hereto in the appendix.

II.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

NATURE OF THE PROCEEDINGS.

This is a criminal case originating in the Circuit Court of Miller County, Arkansas, by Information filed by the Prosecuting Attorney on December 28,

1956, in which the Information charges, omitting the formal parts, as follows:

> " . . . in Miller County, Arkansas, did unlawfully, willfully and feloniously have and keep in his possession a certain still and still worm to be used and operated as a distillery for the purpose of making and manufacturing alcoholic, vinous, malt, spirituous and fermented liquors without registering the same with the proper United States officials as is required by law against the peace and dignity of the State of Arkansas."

It will be noted that the Appellant was very specifically charged with possession of a certain still and still worm to be used and operated as a distillery without registering the same with the proper United States Officials as required by law. The Information plainly charges the possession of a complete distillery of such a type and design as would require registration under the law of the United States.

The Federal Statute requires registration as follows:

> "26 U.S.C. 5174: Registry of stills. (a) Requirement. — Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence and the purpose for which said still or distilling apparatus has been or is intended to be used:

Provided, That stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section."

The plain simple legal intent of the pleader drafting the Information was to charge the offense of possessing a complete distillery, complete with still worm, without registering the same with the proper Officials of the United States. A Federal question was raised by the Information itself. It is urged that the appeal should be allowed under Rule 36 of the United States Supreme Court Rules. The Chief Justice of the Supreme Court of Arkansas entered an order on December 23rd granting the appeal to the Supreme Court of the United States and taking security and staying execution pending such appeal.

On March 4th, 1957, the Appellant pleaded not guilty, the case was tried and at the close of the state's case the Defendant moved for an instructed verdict, which appears in detail beginning at Page 21 of the Appellant's original Abstract and Brief. The Federal question was there raised. See Page 23 of Abstract. The trial court sentenced Appellant to three years in the penitentiary. Appellant filed his Motion for a New Trial which was overruled and Appellant thereupon perfected an appeal to the Supreme Court of Arkansas. The Judgment of the Supreme Court of Arkansas affirming the conviction was entered October 14, 1957, and the Appellant exhausted his remedies before the Supreme Court of Arkansas by filing a Petition for Rehearing, which was denied on November 11, 1957; notice of appeal was filed in the Supreme Court of Arkansas on November 15, 1957, and subsequently the time for perfecting this appeal to the Supreme Court of the

United States was enlarged until February 28, 1958.

The Statutes pursuant to which the appeal is brought is Title 28 U.S.C.A. 2101 and 28 U.S.C.A. 869.

The cases believed to sustain jurisdiction are *United States vs. Cafero*, 55 Fed. (2d) 219, and *United States vs. Moses*, 205 Fed. (2d) 358.

QUESTIONS PRESENTED BY APPEAL.

QUESTION No. I. The states cannot by legislative act or judicial precedent nullify, abrogate, modify or repeal the Acts of Congress.

QUESTION No. II. The Appellant has been denied due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that he was convicted of an offense with which he was not charged.

QUESTION No. III. The Information charged a specific offense but the accused was convicted of a different offense not embraced or included in the charge. The trial court erroneously construed 26 U.S.C. 5117 not in accordance with Federal decisions and the majority of the Arkansas Supreme Court erroneously construed the Federal Statute not in accordance with Federal decisions.

That the Notice of Appeal and Jurisdictional Statement to accompany the Notice of Appeal as filed in the Supreme Court of the State of Arkansas embraced and included the questions herein raised.

CONCISE STATEMENT OF THE CASE.

The Appellant was charged, as stated, with possession of a complete still and distillery, which was subject to registration and the Information charged that the same was not registered with the proper United States Officials. There was no question raised as to whether it was registered with the State of Arkansas or not. To determine what law requires registration we must, of course, examine the Federal Statutes, and the Appellant had a right to read and interpret the Information filed against him as charging him under the Arkansas Statutes 48-937 with the offense of possessing a distilling apparatus sufficiently complete to require such registration. The Federal questions sought to be reviewed were raised by the Appellant's Motion for an instructed verdict of not guilty. The Federal question had been tendered by the Information itself. The Federal question was raised again in the Defendant's Motion to enter judgment declaring Defendant not guilty, which appears in detail at Page 8 in the Abstract and Brief for Appellant filed with the Record herein. The very question, that as a matter of law, the Statutes of the United States do not require registration of any distilling apparatus other than a full and complete still was raised in this Motion. See Pages 8 and 9 of Abstract and Brief filed by Appellant in the Supreme Court of Arkansas, and the trial court as reflected by 7 and 8 of the original Transcript. The Appellant raised the specific question that the State of Arkansas is without power to make requirements for the United States of America other than those made by the Congress of the United States. In the objections to the charge of the court to the jury the Federal question

was raised. See Page 42 of Abstract, Pages 68 and 69 of original Transcript.

SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED.

States certainly cannot legislate for the Congress of the United States and make requirements for the registration of less than a complete and set up still with the proper United States Officials. The states cannot do this any more than they can secede from the Union, declare war, nullify the acts of Congress or refuse to be bound by the Supreme Court decisions. It may be contended that the encroachment upon the Federal sovereignty is small in the instant case, but if the State of Arkansas can pass laws for the entire United States it ceases to be one of many and becomes one over many.

In the original charge against the Appellant there was no evidence to sustain the charge and the Appellant was entitled to an acquittal. See Ex Parte Bain 121 U.S. 1, 7 S. Ct. 781.

The Appellant was convicted with an offense with which he was not charged, and that amounted to a denial of due process of law. Justice George Rose Smith in his dissenting opinion in the instant case comments very accurately:

> "The Information was not complete or defective. It charged a specific offense, but the accused was convicted of a different offense. If Philyaw had been accused of murder and convicted of robbery, apparently the majority would find no prejudice, for he might have asked for a bill of particulars."

In *Commonwealth vs. Graham*, a Pennsylvania

case, 83 Atlantic (2) 632, the Appellate Court ruled that a conviction of a defendant of a crime for which he had not been indicted was a denial of due process of law.

In the case of *State vs. Sweet*, a South Carolina case, 70 SE (2d) 234, the Appellate Court ruled that reversible error resulted when the Appellants charged with the offense of housebreaking committed in the day time were found guilty of a different offense, namely housebreaking in the night time.

The Supreme Court of the United States said in the case of *Carter vs. People*, 67 S. Ct. 216:

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A state must give one whom it deprives of freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyer's language, dehors the record."

Obviously both the trial court and the learned Supreme Court of the State of Arkansas misconstrued the Federal Statute requiring registration of a distillery. The Appellant earnestly insists that the questions presented are so substantial as to require plenary consideration with briefs upon the merits, and in the alternative, in the event it should be decided that this is not a proper case for appeal, the Appellant urges that this be treated as a Petition for Writ of Certiorari.

WHEREFORE, the Appellant prays that jurisdiction be noted, that this cause be set for hearing upon briefs and such other plenary proceedings as the Court deems proper, and that the Supreme Court reverse and dismiss and for other proper relief.

Respectfully submitted,
GEORGE F. EDWARDES,
430 State National Bank Bldg.,
Texarkana, Arkansas,
Attorney for Appellant.

I, George F. Edwardes, Attorney for the Appellant, do hereby certify that I have served forty (40) copies of the foregoing Jurisdictional Statement upon the Clerk of the Supreme Court of the United States by mailing the same, and five (5) copies upon the Honorable Bruce Bennett, Attorney General of Arkansas, by mailing the same to the said Bruce Bennett on this 22nd day of February, A.D., 1958.

Dated this 22nd day of February, A.D., 1958.

GEORGE F. EDWARDES

Attorney for Appellant

Appendix.

MINORITY OPINION.

"GEORGE ROSE SMITH, Justice (dissenting):

"If the information had simply charged Philyaw with the possession of an illicit still worm for the unlawful manufacture of intoxicating liquors, then the record would support the conviction for that offense. The majority treat the information as if it read as I have suggested but it does not so read. In my opinion the information charged a materially different offense, which the State failed to prove and which does not fairly include the distinct crime of merely possessing an illicit still worm.

"'The majority quote Ark. Stats. 1947, Section 48-936.1, which makes it unlawful to possess an illicit still or still worm, and seem to assume that this is the only statute that need be considered. This section is in substance an amendment of Section 3, Art. VI, of Act 108 of 1935, and is to be read as if it were part of Act 108. Section 5 of the same article in Act 108 must be read along with Section 3 and contains this definition of an illicit still:

"'An illicit still or apparatus designed for the unlawful manufacture of intoxicating liquor shall include an outfit or parts of an outfit, commonly used, or intended to be used, in the distillation or manufacture of spirituous, vinous or malt liquors which is not duly registered in the office of a Collector of Internal Revenue for the United States, the burden of proving that same is so registered shall be on the defendant or defendants under charge.' Ark. Stats. Section 48-937.

"This information charged Philyaw with pos-

sessing a still and still worm without registering them with the proper United States officials. The section disregarded by the majority is actually the only statute that refers to registration of the still with the United States; so this section cannot be ignored in determining what offense was charged by the information. The federal law requires the registration only of stills that have been 'set up,' which excludes from the registration requirement an incomplete still which is incapable of operation or a mere part of a still, such as a still worm. 26 U.S.C.A. (I.R.C. 1954), Section 5174; United States v. Cafero, 2 Cir., 55 F. 2d 219; United States v. Moses, 2 Cir., 205 F. 2d 358. Without detailing the evidence it is enough to say that in the case at bar the State failed to prove that Philyaw had in his possession a distilling apparatus sufficiently complete to require its registration under federal law.

"It is true, as I stated at the outset, that the State might have charged Philyaw with the mere possession of an illicit still worm, for that conduct is made criminal by Ark. Stats. 48-936.1. But the State chose instead to charge Philyaw with the unlawful possession of a still and still worm that had not been registered as required by federal law. There was of course no reason for the information to mention federal registration unless the intent was to charge the offense defined by Ark. Stats. Section 48-937, that of possessing a distilling apparatus sufficiently complete to require such registration.

"It seems clear to me that defense counsel, upon reading the information, was justified in believing that his client was accused of having possessed an essentially complete still, of a type subject to federal registration, and that that was the only charge he was expected to defend. I do not understand the majority's suggestion that counsel should have asked for a bill of particulars.

The information was not incomplete or defective. It charged a specific offense, but the accused was convicted of a different offense. If Philyaw had been accused of murder and convicted of robbery, apparently the majority would find no prejudice, for he might have asked for a bill of particulars.

"By Instruction No. 7 the court, in my opinion erroneously, told the jury to return a verdict of guilty upon the mere finding that Philyaw had in his possession an illicit still worm. Counsel objected to this instruction in these words: 'That Instruction No. 7 instructs the jury that defendant would be guilty if he had in his possession a still worm, still tube, or still coil used for condensation of vapor. The information did not so charge, but charged possession of a still worm and a still, and this is an instruction upon an offense not included in the information to which the defendant announced ready for trial.' The objection goes to the very error that in my judgment entitles the appellant to a new trial.

"HARRIS, C. J., and ROBINSON, J., join in this dissent."

MAJORITY OPINION.

WARD, Justice.

An information was filed against appellant, Derrell Philyaw, charging that he did "wilfully and feloniously have and keep in his possession a certain still and still worm to be used and operated as a distillery for the purpose of making and manufacturing alcoholic, vinous, malt, spirituous and fermented liquors without registering the same with the proper United States officials as is required by law."

Appellant was convicted by a jury and sentenced to 3 years in the penitentiary; hence

this appeal.

The statute under which appellant was charged is Ark. Stats. 48-936.1, which reads:

> "It shall be unlawful for any person to own, have in possession, or knowingly transport an illicit still or still worm for the unlawful manufacture of intoxicating liquors, and it shall be unlawful for any person, or persons, firms or corporations, to engage in and manufacture spirituous liquors without first having license to manufacture intoxicating liquors from the State of Arkansas and the United States of America."

We call attention to the fact the above statute anticipates three separate law violations, viz: (a) The possession of an illicit still; (b) The possession of a still worm (both for the unlawful manufacture of intoxicating liquors); and, (c) The manufacture of spirituous liquors without a license from the State of Arkansas and the United States.

The proof in this case shows that appellant violated division (b) of the above statute in that he possessed a still worm for manufacturing spirituous liquors.

Appellant earnestly insists that the case should be reversed, stressing three principal grounds.

(1) One. Appellant says he was "entitled to know the nature of the charge in order that he might (may) prepare his defense." He points out that the information charged him with possessing a still and still worm without registering the same with the proper United States Officials. We cannot believe appellant was in any way misled. The trial court, by instructions 4, 5 and 7,

made it plain to appellant that he could be found guilty for possessing only a still worm for the purpose of manufacturing spirituous liquors. Ark. Stats. 43-1012 provides that:

> "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

In Ragsdale vs. State, 222 Ark. 499, 262 SW 2d 91, the above quoted statute was cited and the information was sustained, the court stating that "The evidence produced no element of surprise." Likewise we think appellant was in no way surprised by the State's testimony in this case. If appellant was in any way confused by the wording of the information he could have asked for a bill of particulars, but having failed to do so he cannot now complain.

There is no merit in appellant's contention that the still (found in his possession) was not set up or complete and therefore not subject to registration with the Federal Government. It was not necessary under the statute or the court's instructions to prove that appellant even had a still.

Two. Appellant complains that the trial court asked the witness and himself improper questions. The record fails to disclose any objections by appellant to any such questions.

(2) Three. Appellant's objection to the court's instruction No. 4 on the ground that it failed to describe an illicit still in accordance with the Federal statute, indicates no reversible error. As indicated previously, it was immaterial what kind of a still appellant possessed or whether he possessed a still at all. The evidence was

sufficient to sustain a conviction of possessing a still worm for making spirituous liquors.

We have considered other objections raised in the motion for a new trial, but find in them no reversible error.

Affirmed.

PENITENTIARY COMMITMENT.

STATE OF ARKANSAS,
COUNTY OF MILLER

STATE OF ARKANSAS vs. DERRELL PHILYAW

No. 7350

In the Miller County Circuit Court,

Proceedings: November Term, 1956, March 29th, 1957.

Information: Possessing a Still.

This day this cause comes on for trial upon the Information filed by Travis Mathis, Prosecuting Attorney, within and for the Eighth Judicial Circuit of Arkansas, and the following proceedings are had: That on a former day, to-wit: March 13th, 1957, said defendant was tried by a jury and found guilty of the crime of possessing a still and his punishment fixed at a term of Three Years in the State Penitentiary and said defendant on being asked if he had any legal cause to show why sentence should not be passed and none being shown.

It is therefore considered, ordered and adjudged by the Court that said defendant be remanded into the custody of the Sheriff of Miller County, and to be by him delivered to the penitentiary authorities there to be by them safely and speedily transported to the Penitentiary

House or State Convict Farm or Camps of the State of Arkansas, and there confined at hard labor for the period of Three Years, dating from March 13th, 1957, and that the State of Arkansas do have and recover of said defendant all the costs of this prosecution and have execution thereof. It is further ordered by the Court, that the Clerk of this Court make out and deliver to said Sheriff a certified copy of the foregoing judgment to be by him delivered to the Agent or Keeper of said Penitentiary as sufficient authority for him to receive and confine the said Derrell Philyaw in the manner aforesaid.

STATE OF ARKANSAS,
COUNTY OF MILLER, ss.

I, L. B. Greer, Clerk of the Circuit Court for said County and State, do hereby certify that the above is a true and perfect transcript of the judgment and sentence of said Court in the cause therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 20th day of February, 1958.

L. B. GREER, Clerk
By RUBY CUTTS, D.C.